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961315 FEB 18 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ALBERT J. MILLUS,

Petitioner,

vs.

NEWSDAY, INC. and WILLA APPEL,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Petitioner, a public official, meet the burden imposed on him by the decisions of this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny of showing falsity and actual malice on the part of the Respondents sufficient to defeat their motions for summary judgment?

2. When the evidence demonstrates, and there is no challenge by the Respondents that the word "admits" was never stated by the Petitioner and the word used in the reporter's draft is "seems," is it within the contemplation of constitutionally protected freedom of expression for the newspaper, in substituting "admits," to assume that its readers will accept the result as opinion? Was this reckless disregard for the truth?

3. Is the concept expressed in the Memorandum Opinion of the Court of Appeals, that any statement appearing on an editorial page is, per se, construed by the readers as opinion and thereby constitutionally protected?

4. Is it constitutionally permissible for a newspaper to offer as a defense to the use of an alleged libelous statement, that a "tacit" impression based on an interview can be turned into a unequivocal admission?

PARTIES TO THE PROCEEDING

Petitioner, Albert J. Millus, Attorney *Pro Se,* was a candidate for public office in the State of New York at the time of the alleged libel.

The Respondent, Newsday, Inc. is a subsidiary of the Times-Mirror Co., Ltd., the parent company; the Respondent, Willa Appel is an editorial writer for Newsday, Inc.

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Petitioner prays that a writ of certiorari issue to the Court of Appeals of the State of New York to review a judgment of that court entered on November 19, 1996.

OPINIONS BELOW

The unanimous opinion of the Court of Appeals reversing the majority decision of the Appellate Division and granting summary judgment to the Respondents is set forth in Appendix A. It has been designated for publication in 89 N.Y. 2d but is not yet reported.

The majority and dissenting opinion of the Appellate Division, First Department, is set forth in Appendix B. They are reported in 638 N.Y.S. 2d 613 (1st Dept. 1996).

The unreported opinion of the Supreme Court of the State of New York, New York County, dated June 21, 1994, granting defendants-respondents Newsday, Inc. and Willa Appel's motion for summary judgment is set forth in Appendix C.

Order of the Supreme Court, Appellate Division, First Department, dated May 14, 1996 granting the motion to appeal to the Court of Appeals is set forth in Appendix D.

Order of the Court of Appeals dated September 12, 1996 granting permission to the Amici Curiae to file an Amici Curiae brief is set forth in Appendix E.

STATEMENT OF JURISDICTION

1. On November 19, 1996, the Court of Appeals of New York reversed a majority opinion of the Appellate Division in which in a 4-1 decision reversed a decision of the Supreme Court of New York granting summary judgment to the Respondents.

That constitutes the final order of the Court of Appeals of New York with respect to this case. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C. § 1257(a) (1990).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .[1]

STATEMENT OF THE CASE

A. The Facts

Petitioner, Albert J. Millus, an attorney admitted to the practice of law in the States of New York, California, the District of Columbia and before the Supreme Court of the United States, was a candidate in a special election to be held on January 28, 1992 in the 44th Assembly District of the State of New York.

The special election was to be held was for the purpose of electing a representative in place of the majority leader of the New York State Assembly, Melvin Miller, who had recently been

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1. *Cf.* N.Y. Const art. 1, § 8:

> Every citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right,* and no law shall be passed to restrain or abridge the liberty of speech or of the press. . . .

Emphasis supplied.

convicted of conspiracy and mail fraud. He was removed from the office of Assemblyman of the 44th Assembly District. (The conviction was subsequently reversed on appeal.)

The Petitioner was the Republican-Conservative Parties' candidate in a district where registered Democrats outnumbered Republican-Conservatives by a ratio of five to one.

To possibly obtaining editorial endorsement in the coming election, Petitioner wrote to the New York Times, The Daily News, Newsday, Inc. (Respondent herein), and Citizens Union for an interview regarding his qualifications for election to the New York State Assembly.

On January 22, 1992, Petitioner met with the Respondent, Willa Appel at the offices of New York Newsday at 2 Park Avenue in Manhattan. During the interview Petitioner mentioned that he had six children, five boys and a girl, and that it would be a financial loss if he were elected. He also mentioned that he had obtained a copy of the Budget Bills of both the New York State Senate and Assembly in order to familiarize himself with the current budget battle in Albany.

Petitioner emphasized that in view of the majority leader's conviction for fraud and conspiracy, morality was an extremely important qualification for every office holder in New York State.

In regard to morality, Petitioner informed Ms. Appel that a recent article in the Wall Street Journal dated December 13, 1991 entitled The Joy of What?, pertained to the prominent athlete, Magic Johnson, who had contracted the Aids virus after having sex with a number of partners. The article quoted the famous female tennis star, Martina Navratilova, who "blew the whistle", saying that "if a woman had admitted to having hundreds of partners, they'd call her a 'slut.' " (Appendix F).

Petitioner also commented on the display of immorality in TV shows like "Dallas," which continually dealt with unethical practices in business.

Petitioner asserted that just as sexual immorality was destroying family life in America, immorality in business and government was equally destructive.

1. The Newsday Editorial

On January 24, 1992 the editorial at issue was published in New York Newsday. The editorial regarding the Petitioner told its reader that the Democratic-Liberal candidate was running "against lawyer Albert Millus (R-C), who *admits* (emphasis added) he doesn't expect to win and [admits] is relieved by the prospect."

It was that phrase which is the subject matter of this entire libel action.

The Respondent, Willa Appel, in an affidavit dated January 22, 1992 stated that her draft of the interview contained the phrase Millus "seems neither to want nor expects to win" and that the editorial represents solely her opinions and the opinions of New York Newsday and the impressions that plaintiff made upon her during the meeting on January 22, 1992.

When questioned under oath at an examination before trial on November 12, 1992, the following questions were answered:

Q. Did I say that I do not expect to win.

Ms. Appel answered:

A. You didn't say quote, I do not expect to

> win in those precise words, but the gist of your conversation and what you said to me is that you didn't expect to win, that winning would be an absolute miracle.
>
> Q. Did I specifically say I would be relieved by the prospect or not winning.
>
> A. Not in those precise words.

The remaining portion of the article consisted of thirty three words in three sentences, none of which would leave any reader to think or believe the editorial use of the word "admits" was merely an opinion or bolstered any other view than that Petitioner made the admission as stated in the editorial.

Those three phrases/sentences were as follows:

> 1. "That's just as well since Millus — unlike the experienced Yoswein — hasn't a clue about government."
>
> 2. "Albany's budget battle is beyond him."
>
> 3. 'He seems more concerned about the moral standards of TV shows like "Dallas'."

Petitioner contacted the Respondent the day the article was published and demanded a retraction of the libelous statement. The Respondent refused although she explicitly stated that Petitioner did not "admit" what was attributed to him and explicitly stated that Petitioner did not admit that Petitioner would be relieved by the prospect. Ms. Appel explicitly asserted that these were only her *opinions* (emphasis added). A written demand for a retraction dated January 25, 1992 was hand-

delivered to the Newsday Inc. Office at 2 Park Avenue, New York, New York. (Appendix G).

2. The Proceedings

On March 15, 1992, Petitioner served his complaint in a libel action against Newsday, Inc. and Willa Appel in the Supreme Court of the State New York, County of New York. The Respondents herein moved for summary judgment in June 1993. The court granted that motion by order entered June 24, 1994, on the grounds that the Respondents' statement that Petitioner "admits he doesn't expect to win and is relieved by the prospect" was a statement of their opinion and that making that statement was not "analogous" to having "fabricated a quotation" and further that the petitioner did not "produce evidentiary proof in admissible form sufficient to require a trial of "the question of actual malice."

Petitioner appealed that decision to the Appellate Division of the New York Supreme Court, First Department. That court reversed the lower court by order entered February 15, 1996 on the grounds that the Petitioner has sufficiently shown by clear and convincing evidence that genuine issues of fact remain as to whether a reasonable reader would believe the statement was the equivalent of a quotation, and, if so, whether the deviation between the stated comments and the published alleged admission resulted in a material change in meaning.

The appellate court ruled that since jury questions are presented as to whether the alleged admission was the equivalent of a quotation, and, if so, whether it constituted a material deviation from plaintiff's actual statements and, if so, whether its attribution to plaintiff was sufficient to hold him up to public contempt or ridicule, summary judgment dismissing the complaint was not warranted. *Albert J. Millus v. Newsday Inc., and Willa Appel,* 638 N.Y.S. 2d 613 (1st Dept. 1996).

Thereupon the Respondents by motion dated March 15, 1996 appealed to the Appellate Division of the Supreme Court for permission to appeal to the Court of Appeals. The application was granted on May 14, 1996.

The Court of Appeals heard the oral argument on October 8, 1996. In that argument Respondents conceded that the Respondent, Willa Appel, in her draft of the editorial in question wrote that the Petitioner "*seems* (emphasis added) neither to want to nor expects to win." The draft did not contain the statement that he (Millus) would be relieved by the prospect as did the published article.

The attorney for the then appellants conceded that the written draft of the article definitely did not state that the Petitioner used the word "admits" but only contained the impression — "seems". Thus a smoking gun had been found which conclusively proved that the libelous statement was made with actual malice, *i.e.*, with knowledge of its falsity and with reckless disregard of the known truth of what was actually said by Petitioner and known by the Respondents.

The attorney for the Respondents at the outset of the oral argument before the Court of Appeals conceded that the claimant had proved falsity, *i.e.*, "actual knowledge", and that the question before that court was not as to opinion but as to the factual statement in the editorial. The following colloquy took place as transcribed from a taping of the proceeding by Albany Law School:

> MR. SACK (attorney for the then appellant): I would like, if I may, to focus my argument this afternoon, as we did in our reply brief, mostly on the two step process which the falsity and actual malice aspect of

> this case for two reasons, first, because we think it is the clearest one on which we should win this case. —
>
> THE COURT: Did we pass the issue of fact versus opinion then?
>
> MR. SACK: I would not press on this Court today, fact versus opinion. Whether it was factual, I think whether it was true or false, *but the claimant has proved falsity,* [emphasis added] I certainly do wish to discuss with the Court this afternoon, but I would not press the opinion issue on the Court this afternoon if I may.
>
> THE COURT: So we are proceeding as if this were fact?
>
> MR. SACK: As if this were a — I think it is easier to analyze this, if one proceeds on the assumption that it was (inaudible), yes.

The court found a significant difference between "seems" and "admits", and that the Respondents' lawyer was mixing the two when it referred to the record before that court:

> THE COURT: Would it be the same using the word of our admits in the reasonable person's interpretation if the admission were to something else? He admitted to some horrendous crime. If that were the phrase that we were contending with in that kind of a case, does the word admit take on a different meaning in terms of malice and for the test that we need to apply?

MR. SACK: I think it would depend on the facts that — Supposing he admitted murder and, in fact, he did not say in those words, I murdered the person, but one could reasonably infer from that, that that is exactly what he meant . . . I think the word admission can be used as an inference no matter how . . .

THE COURT: That may be so but we have an additional record here. We know what the last draft said. And there is a pretty significant difference between seems like he doesn't expect to win and admits he doesn't expect to win.

MR. SACK: Yes, I am not sure there is a tremendous difference, but let's talk about that because I think that goes to the issue not of falsity, but of actual malice.

THE COURT: We seem to be mixing the two.

MR. SACK: — what happened here, is that the author, Miss Appel, wrote: Seems neither to want nor to expects to win. That was her direct and that was part of two paragraphs of a rough first draft that she wrote. She gave it to the editor and the editor did not make a change. The editor in these two paragraphs made eight or ten changes. . . . And one of the changes he made was to change it from seems to who admits he doesn't expect to win.

THE COURT: There is a substantial difference between an observer's subjective idea of what the candidate expects and what they say the candidate —.

THE COURT: He wasn't just — the editor wasn't just cutting back the number of words. The editor was really starching up what was said.

MR. SACK: He talked to her about what had gone on and this is what — he was doing what editors do. The editor is sitting there, in my view, at least, with a bag of words next to him and he reached down and pulled out, with a deadline in front of him, the election next Tuesday, he pulled out the word admits.

Now, maybe sitting here, two and a half, four and a half years later, we can come up with a better word and a better way to say that, but you know, we can try our hand a being editors four and a half years later, but it seems to me that if actual malice means anything.

THE COURT: As an editor, I am sure he had a command of the language more so then the average person.

MR. SACK: I am sure he did and I don't think that there was anything —

THE COURT: When he changed it from seems to admits, he knew what he was doing.

> MR. SACK: Without doubt he knew what he was doing.

As to Petitioner's oral argument before the Court of Appeals, the following questions were asked:

> THE COURT: Where is the falsity, Mr. Millus? (Paul F. Millus, Esq. presented the oral argument for the then Respondent).
>
> MR. MILLUS: Where the courts generally will not strain to interpret a word to find libelist content, this Court should not strain to find the word admit to mean anything more then what it is to the ordinary average reader, not to the lawyer. Admit is admit, pure and simple.
>
> And the falsity here is they put words in the plaintiff's mouth that he didn't say.
>
> THE COURT: But this is not a quotation.
>
> MR. MILLUS: But that is the key, your Honor, because the Court said in Masson, quotations are analogous claims and you can't get more analogous to a quotation then putting the word admit then following it with words that you say a speaker said. It is identical.

The granting of the motion for summary judgment was in opposition to this Court's ruling in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) and *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896 (9th Cir. 1992), 501 U.S. 496, 115 L. Ed. 447, 111 S. Ct. 2419 (1991).

REASONS FOR GRANTING THE WRIT

I.

IT IS VITALLY IMPORTANT FOR A DETERMINATION TO BE MADE AT THE HIGHEST JUDICIAL LEVEL, THAT THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT CONFER ON A NEWSPAPER, THE RIGHT TO PUT WORDS IN SOMEONE'S MOUTH, AND PUBLISH AS AN UNEQUIVOCAL ADMISSION, A STATEMENT WHICH IS INACCURATELY CONSTRUED AS AN ADMISSION, MAKING IT FALSE AND DEFAMATORY.

While truth is a defense to a libel action, an impression or opinion which purports to represent the truth, but is, in fact a mere subjective belief of a reporter or newspaper, does not meet the test of defense. In the case at bar, there is already acknowledgement on the part of Respondents, in the argument before the New York Court of Appeals, that the use of the word "admits" in the subject article (editorial) was false. To conform a constitutionally protected right to an opinion or impression, to cover a false attribution of an admission, without a scintilla of justification, is to open the door to a dangerous and unwarranted media freedom. A writing containing the reference to an admission, which is only the opinion or impression of the writer, and which can only be construed by the reader as fact and/or truth, is libelous under the libel law of New York State and the United States. It is essential that this Court set the parameters for what is constitutionally protected and what is not.

The Court of Appeals of New York State pointed out in the case of *Brian v. Richardson*, 87 N.Y. 2d 46, 637 N.Y.S. 2d 347, *affirming*, 211 A.2d 413, 621 N.Y.S. 2d 48 (1st Dept. 1995) that:

> *We emphasize that an article's appearance in the sections of a newspaper that are usually dedicated to opinion does not automatically insulate the author from liability for defamation.* Despite our firm commitment to encouraging the robust exchange of ideas through these and similar media, *we have never suggested that an editorial page or a newspaper column confers a license to make false factual accusations and thereby unjustly destroy individuals' reputations* (see, e.g. *Immuno AG. v. Moor -Jankowski*, 77 N.Y. 2d 235, 254 [566 N.Y.S. 2d 906,567 N.E. 2d 1270]). To the contrary, we have repeatedly emphasized that the forum in which a statement has been made, as well as the other surrounding circumstances comprising the "broader social setting," are only useful gauges for determining whether a reasonable reader or listener would understand the complained of assertions as opinion or statements of fact.

Emphasis added.

In the case before this Court the Petitioner is asking for a determination that a newspaper or newswriter is outside the limits of constitutional protection, by publishing an allegedly libelous statement based on personal opinion or impression as if it were fact, and explicitly stated by an individual to whom it is attributed, when actually it is fabricated. For example, the newspaper published the statement that Mr. Millus "admits he doesn't expect to win and is relieved by the prospect," when the word "admits" was never used in the interview, as acknowledged by Respondents.

She expressed the opinion that (1) the Petitioner hasn't a clue about government; (2) Albany's budget battle is beyond him; and finally (3) [h]e *seems* more concerned about the moral standards of TV shows like "Dallas".

All are obviously her opinions. None contain the word "admits" as to the Petitioner's comment on these points. In fact, the reader could not possibly believe his alleged admission was anything else than an admission particularly when the writer expressed the view as to her impression regarding the moral standards of TV as expressed by the word "seems".

The Court of Appeals decision took into account the statements made by the Petitioner as to the conversation about his children in college and the salary of an Assemblyman. But neither of these statements appeared in the editorial.

Whether a potentially actionable statement is one of fact or opinion depends on what a reasonable reader of that article believed. Neither a cursory or a thoughtful reading of that article, regardless of the degree of education of the reader would lead to any conclusion other than it was an outright admission of a damning nature that would hold the candidate up to contempt and ridicule to all the readers of the editorial. There was not a word in the article about financial hardship or children in college.

The defendant, Willa Appel, did have opinions after the interview as reflected in the three sentences/phrases after the alleged libelous statement, in one of which Ms. Appel expressed that opinion by the use of the synonym "seems". But as to the alleged libelous statement the defendant, Ms. Appel, had actual knowledge that in her subjective thinking the Petitioner "*seems* neither to want to nor expects to win" (emphasis added). To convert that opinion into an admission of not wanting to win, in the face of her absolute knowledge that Petitioner had solicited

the interview in an effort to highlight his candidacy, was glaringly inconsistent, and an untruthful statement. It was, therefore, with palpable malice that the word "admits" was used, for it served to expose Petitioner to contempt and ridicule and obliquely serve the newspaper's preference for the competing candidate.

II.

THE DECISION OF THE COURT OF APPEALS WAS CONTRARY TO THIS COURT'S HOLDING IN *MILKOVICH V. LORAIN JOURNAL CO.*

Respondents now contend that the alleged libelous statement was an opinion. But the Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L. Ed. 2d l, 110 S. Ct. 2695 (1990), specifically outlined the extent of constitutional protection for expressions of opinons, *viz:*

1. This Court rejected a separate constitutional privilege for opinion because to do so "would . . . ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich,* 110 S. Ct. at 2705.

2. Statements of opinion which are not "provable as false" are fully protected by the First Amendment. *Milkovich,* 110 S. Ct. at 2706.

3. Rhetorical hyperbole, verbal abuse, and other "imaginative expression" are protected, non-actionable expression. *Milkovich,* 110 S. Ct. at 2705.

4. Statements of "opinion" which can reasonably be interpreted as stating or implying assertions of fact which are provable as false are *not* protected expression,

and can form the basis of a defamation action. *Milkovich,* 110 S. Ct. at 2705.

A reading of the draft of the article containing the alleged libelous statement in the case before this Court (Appendix H) and a reading of the article itself (Appendix I) clearly shows that the writer had an opinion expressed as "seems" and then published it as an admission by substituting the word "admits" for the opinion word "seems". Even if it were *arguendo*, an opinion, it would be actionable under the *Milkovich* holding.

The substitution of the word "admits" for the word "seems" which had appeared in the reporter's draft totally distinguishes this case from the case of *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 397 N.Y.S. 2d 943 (1977), on which Respondents rely, wherein certiorari was denied. 434 U.S. 969 (1977).

The *Rinaldi* case is not relevant for four reasons: Firstly, the report in *Rinaldi* was actually an opinion as the report stated the judge was "probably corrupt" and "suspiciously lenient." Secondly, the editorial of the Respondents herein contained no facts supporting the alleged admissions by Petitioner. Thirdly, the sentence in the editorial: "He seems more concerned. . . ." certainly doesn't support the alleged admission by Petitioner nor do any other words, phrases or sentences in that editorial support the admission at issue. Fourthly, an admission is not an opinion as so succinctly noted by the appellate court which pointed out that "by using the word 'admits', which has a commonly understood meaning,[2] defendants clearly conveyed to a reasonable reader that they were giving a factual account of a statement actually made by plaintiff, rather than offering their

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2. Which is, according to Webster's Ninth Collegiate Dictionary (1990), "to concede as true or valid."

own opinion of plaintiff's attitude." *Millus v. Newsday and Willa Appel,* 638 N.Y.S. 2d 613, 615 (1st Dept. 1996).

III.

THE DECISION OF THE COURT OF APPEALS WAS CONTRARY TO THIS COURT'S HOLDING IN *MASSON V. NEW YORKER MAGAZINE, INC.*

Contrary to the contention of the Respondents herein that the Appellate Division's decision was a "mistaken conclusion," a "misreading of *Masson"* and "violently at odds with repeated declarations by the Supreme Court of the United States", the *Masson* case is directly applicable to the petition before this Court and calls for a reversal of the decision of the New York Court of Appeals.

Plaintiff's libel action in the *Masson* case was based on allegations that the publication attributed to him statements he did not make. (Petitioner in the case at bar sued for libel on the very same grounds.)

The federal District Court in San Francisco held that no reasonable jury could conclude that the writer entertained serious doubts about the accuracy of those quotes and dismissed the complaint. The United States Court of Appeals affirmed, ruling, among other reasons, that the quotations did not "alter the substantive content" of unambiguous remarks actually made by the public figure. *Masson v. New Yorker Magazine Inc.,* 895 F.2d 1535, 1539 (9th Cir. 1990).

Judge Kozinski strongly dissented, parting with the majority opinion, on a "single but fundamental point; the meaning of quotations." *Id.* at 1548.

In his dissenting opinion Judge Kozinski concluded:

> Truth is a journalist's stock in trade. To invoke the right to deliberately distort what someone else has said is to assert the right to lie in print. To have that assertion made by *The New Yorker,* widely acknowledged as the flagship publication when it comes to truth and accuracy, debases the journalistic profession as a whole. Whatever it might have taken to refute *Masson's* allegations on the merits is not, in my view, worth the unsettling implications left by defeating him on these grounds. Masson has lost his case, but the defendants, and the profession to which they belong, have lost far more.

Id. at 1570.

A petition for a writ of certiorari was filed and granted.

The judgment of the Court of Appeals was reversed, and the case was remanded for further proceedings consistent with the opinion of this Court. *Masson v. New Yorker Magazines Inc.,* 960 F.2d 896 (9th Cir. 1992), 501 U.S. 496, 526 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991).

The Appellate Division (First Department) in *Millus v. Newsday, Inc. and Willa Appel,* 638 N.Y.S. 2d 613 (1st Dept. 1996), correctly followed the ruling in *Masson,* 501 U.S. at 517-518, that the "deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of *New York Times v. Sullivan,* 376 U.S., at 279-280, 84 S. Ct., at 725, 726 and *Gertz v. Robert Welch, Inc., supra,* 418 U.S., at 342, 94 S. Ct., at 3008 unless the alteration results in a material change in the meaning conveyed by the statement."

The similarity of the facts in *Masson* and the law confirm

the Appellate Division's decision in the case at bar — *Millus v. Newsday, Inc. et ano.*, 638 N.Y.S. 2d 613, 617 (1st Dept. 1996), 89 N.Y. 2d __ (1997) where the court ruled:

> [I]n order to establish knowledge of falsity for purposes of *New York Times v. Sullivan*, 376 U.S. at 279-280, 84 S. Ct. at 725-726, and *Gertz v. Robert Welch Inc.*, supra, 418 U.S. 342, 94 S. Ct. at 3008, unless a party alleging that he or she was falsely quoted must show that the alteration in his or her words "result[ed] in a material change in the meaning conveyed by the statement." Although the statement at issue here, unlike the ones dealt with in *Masson*, was not surrounded by quotation marks, this does not, as defendants argue, eliminate the possibility that this standard should apply. In *Masson*, the Court referred to claims which are "analogous" to fabricated quotations (*Masson v. New Yorker Magazine*, supra, 501 U.S. at 518, 111 S. Ct. at 2433) and indicated that the real standard is not whether quotation marks are used, but whether a reasonable reader would understand that the author was making "nearly verbatim reports of statements made by the subject" (supra, at 513, 111 S. Ct. at 2431), rather than his or her "own interpretation of an ambiguous source" (supra, at 519, 111 S. Ct. at 2434). The within statement, while not surrounded by quotation marks, used a similar device, i.e., use of the word "admits", which like quotation marks, could convey to a reader that it was plaintiff's words, not the author's,

which were being reported. Under these circumstances, we find that the statement could reasonably be read not as the author's interpretation, but as a tacit quotation, relating the actual content of plaintiff's admission.

Once the court finds a reasonable basis from which a jury could find that words were defamatory, it is for the jury to evaluate how the words would be understood by the ordinary and average reader (*James v. Gannett Co.*, 40 N.Y. 2d 415, 419, 386 N.Y.S. 2d 871, 353 N.E. 2d 831). Thus, in this case, we find that, in light of defendants' use of the word "admits", there is a reasonable basis from which the jury could find that the words were likely to be understood by the ordinary and average reader as a nearly verbatim report. If the jury were to make such a finding, review of the defendants' knowledge would be required under the *Masson* standard, and the jury would then be required to consider whether, by stating that plaintiff had "admit[ted]" he would be relieved to lose the election, defendants materially changed the meaning of his actual statements.

We find that plaintiff has sufficiently shown by clear and convincing evidence that genuine issues of fact remain as to whether a reasonable reader would believe the statements was the equivalent of a quotation, and, if so, whether the deviation between the stated comments and the published alleged admission resulted in a material change in meaning.

The draft of the editorial which used the word "seems", later changed to "admits", is the "smoking gun" of this case.

Neither Petitioner or Respondents were able to find a libel case either in the State of New York or any other state in the United States dealing with changing a draft of an editorial using the word "seems" to "admits" in any report whether editorial or otherwise.

Respondents contend that it was proper and fair to make the interpretation after the discussion between the acting editor Mr. Dolan and Ms. Appel, but the readers of Newsday were left with no such choice. The only word they saw in the context of Petitioner's purported statement to the reporter, was "admits." This could have no other meaning to the readers than the readers Petitioner could only be an object of disdain which would hurt Petitioner's standing among his neighbors and friends. As to Petitioner's peers and colleagues in the Republican and Conservative leadership ranks, who accepted him as their candidate, they could only conclude that Petitioner broke faith with them.

While Respondent, Newsday, and the other highly regarded newspapers represented as the Amici, appear to be suggesting that the license to translate the so-called "tacit" into the irrefutable "admits" can be handled judiciously, a highly improbable premise, it is important to emphasize that every other newspaper, magazine or media, responsible and irresponsible, will have the same interpretive license. It is an invitation to disaster.

Rather than narrowing constitutional protection afforded the press, the decision of the appellate court broadens the constitutional protections afforded the press by preserving the essential dignity and worth of every man, so aptly stated by Mr. Justice Stewart of the United States Supreme Court who declared:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of ~~any~~ decent system of ordered liberty.

Rosenblatt v. Baer, 383 U.S.75, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1966).

That same self-evident truth has been adopted by the New York Court of Appeals. That court made it clear that:

> A media defendant surely has no license to misportray facts; false statements are actionable when they would be perceived as factual by the reasonable person.

Immuno A.G. v. Moor-Jankowski, 566 N.Y.S. 2d 906, 917, 77 N.Y. 2d 235, *cert. denied,* 500 U.S. 954 (1991). While the facts of the *Immuno* case readily support the denial of certiorari in that case, the facts in the case at bar supports the Court's ruling as to actionable false statements as noted therein. That principle is applicable to this case before the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM DECISION OF THE STATE OF NEW YORK COURT OF APPEALS DECIDED NOVEMBER 19, 1996

No. 223 Albert J. Millus, Respondent, v. Newsday, Inc. et al., Appellants.

Decided November 19, 1996

Robert D. Sack, for appellants,
Paul F. Millus, for respondent.
The New York Times Company, et al., amici curiae.

MEMORANDUM — The order of the Appellate Division should be reversed, with costs, defendants' motion for summary judgment granted, the complaint dismissed, and the certified question answered in the negative.

Plaintiff commenced this defamation suit against defendants for publishing an allegedly libelous statement about him in the January 24, 1992 issue of New York Newsday. The statement at issue, which appeared in an editorial evaluating and endorsing various candidates for two New York State Assembly positions, declared that the opposing candidate "is running here against [plaintiff], who admits he doesn't expect to win and is relieved by the prospect." Plaintiff does not dispute that when asked if he wanted to win, he replied that he had two children in college and that the salary of an Assembly member was $57,000 a year. However, plaintiff denies stating that he would be relieved if he lost the election.

Defendants moved for summary judgment. Supreme Court granted the motion and dismissed the complaint. The Appellate Division, however, reversed the order of Supreme Court and reinstated the complaint. Defendants' request for leave to appeal

to this Court was granted by the Appellate Division which certified the question. "Was the order of the Court, which reversed the order of the Supreme Court, properly made?"

We reject the contention that defendants' use of "admits" renders the allegedly defamatory statement one of fact rather than an opinion as a matter of law. Whether a potentially actionable statement is one of fact or opinion is a question of law (*Rinaldi v. Holt, Rinehart* 42 NY2d 369, 381), and depends on "whether a reasonable reader or listener would understand the complained of assertions as opinion or statements of fact" (*Brian v. Richardson,* 87 NY2d 46, 52).

When viewed within the context of the editorial as a whole, we agree with Supreme Court that a reasonable reader would conclude that the statement at issue is an opinion (see, *Brian,* supra; *Immuno AG v. Moor-Jankowski,* 77 NY2d 235, cert denied 500 US 954). Apart from the appearance of the statement on the editorial page of Newsday, surrounded by other opinion pieces, the tenor of the editorial (which included an assertion that plaintiff "hasn't a clue about government") alerted the reader that the piece contained expressions of opinion. Moreover, defendants did not quote plaintiff but chose instead to use the word "admits," which in context indicates that some interpretation of defendant's words occurred. Since opinions may not be subject to private damage actions, summary judgment should have been awarded to defendants (see *Rinaldi,* supra at 380-381).

Plaintiff, a public figure, has also failed to demonstrate, with convincing clarity; that defendants acted with actual malice — that is, with knowledge that the allegedly defamatory statement was false or with reckless disregard for the truth or

falsity of the statement (*Rinaldi,* supra at 279; *New York Times Co. v. Sullivan,* 376 US 254, 279-280, 285-286). The substitution of "admits" in the published version of the editorial, for "seems," which appeared in an earlier draft, does not, by itself, demonstrate that defendant acted with reckless disregard for the truth of the statement or with the knowledge that the statement was untrue.

Order, reversed, with costs, defendants' motion for summary judgment granted, complaint dismissed and certified question answered in the negative, in a memorandum. Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Smith, Levine and Ciparick concur.

APPENDIX B — OPINION OF THE SUPREME COURT APPELLATE DIVISION, FIRST DEPARTMENT DATED FEBRUARY 15, 1996

Albert J. MILLUS, Plaintiff-Appellant,

v.

NEWSDAY, INC., et al., Defendants-Respondents.

Supreme Court, Appellate Division, First Department.

Feb. 15, 1996.

* * *

Albert J. Millus, Pro Se.

W.J. Hall, III, for defendants-resondents.

Before ROSENBERGER, J.P., and ELLERIN, WALLACH, KUPFERMAN and MAZZARELLI, JJ.

MEMORANDUM DECISION.

Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered June 24, 1991, which granted defendants' motion for summary judgment dismissing the complaint, reversed on the law, and the complaint reinstated, with costs.

The question before us is whether the broad freedom accorded to the press extends to a situation where a reporter's

impressions of a political candidate's position can unequivocally be reported as the candidate's own admissions.

The statement at issue in this action for libel was printed on the editorial page of defendant newspaper a few days prior to a special election to the New York State Assembly and asserted that plaintiff, who was the Republican candidate in an overwhelming Democratic district, "admits he doesn't expect to win and is relieved by the prospect." Plaintiff does not contest evidence offered by defendants indicating that he had acknowledged to defendant Willa Appel, the reporter who interviewed him, that he had little chance of winning the election and that, in his response to a query regarding whether he wanted to win he made reference to the income reduction that winning would entail. Plaintiff denies however, that he ever stated that a loss would be a relief to him or that he did not wish to be elected and defendants acknowledge that the first draft of the editorial stated only that "plaintiff seems neither to want nor expects to win."

The IAS court held that the entire editorial, including the statement at issue, was protected opinion and dismissed plaintiff's complaint. We find to the contrary and reverse.

The threshold question of whether a statement is a protected opinion or a potentially actionable statement of fact is one of law for the court (*Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290, 508 N.Y.S.2d 901, 501 N.E.2d 550). In making this determination the court must define the words as they are commonly understood, determine whether the statement is subject to verification so that it may be characterized as true or false, and review the communication as a whole, considering its tone and purpose (*Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 566

N.Y.S.2d 906, 567 N.E.2d 1270, *cert. denied* 500 U.S. 954, 111 S. Ct. 2261, 114 L.Ed.2d 713). In this case, we find that, by using the word "admits," which has a commonly understood meaning,[1] defendants clearly conveyed to a reasonable reader that they were giving a factual account of a statement actually made by plaintiff, rather than offering their own opinion of plaintiff's attitude. Nothing about the context in which this statement was published indicated that the fact that the admission was made was anything other than objective fact. That the statement was made within an editorial or that the editorial contained other statements which were clearly opinion do not detract from the fact that this particular sentence conveyed a statement of fact, i.e., the content of an actual admission by plaintiff (*see, Guccione v. Flynt*, 618 F.Supp. 164). We cannot accept that the public's perception of journalism has become so cynical that it assumes that apparent statements of fact made in the editorials of a widely published and respected newspaper are fabrications. While defendants emphasize that this particular editorial made clear that it considered the outcome of the election a foregone conclusion in favor of plaintiff's opponent, this fact, on its own, would hardly alert the reader that the writer would misattribute words to plaintiff in the guise of an "opinion".

As the Court of Appeals pointed out in *Brian v. Richardson*, 87 N.Y.2d 46, 637 N.Y.S.2d 347, 660 N.E.2d 1126.

> [W]e have never suggested that an editorial page or a newspaper column confers a license to make false factual accusations and thereby

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1. Which is, according to Webster's Ninth New Collegiate Dictionary (1990), "to concede as true or valid."

> unjustly destroy individuals' reputations (*see, e.g., Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 254 [566 N.Y.S.2d 906, 567 N.E.2d 1270]). To the contrary, we have repeatedly emphasized that the forum in which a statement has been made, as well as the other surrounding circumstances comprising the "broader social setting," are only useful gauges for determining whether a reasonable reader or listener would understand the complained-of assertions as opinion or statements of fact.

Here, unlike the Op Ed piece involved in *Brian*, the reader of the editorial had no reason to assume that the writer had an ulterior motive to slant the facts upon which the expressed opinion was based to serve his or her own agenda, and nothing about the tone or the purpose of the editorial informed the reader that, in disclosing plaintiff's admission, the writer was "marshall[ing] the relevant rumors" (*id.*) about plaintiff rather than repeating the remarks actually made by plaintiff in an interview. An Op Ed piece, in distinction, is by its very nature understood to be an expression of the writer's personal views and opinions. We find, therefore, that the statement is one of fact.

Defendants further argue that even if the statement attributing the admission was a false statement of fact, it is not actionable because it was not defamatory and caused plaintiff no injury. It is well established that a statement may be found to be defamatory, even in the absence of special damages, where "it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the

minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Rinaldi v. Holt, Rinchart & Winston,* 42 N.Y.2d 369, 379, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied,* 434 U.S. 969, 98 S. Ct. 514, 54 L.Ed.2d 456, *quoting Sydney v. Maefadden Newspaper Pub. Corp.,* 242 N.Y. 203, 211-212, 151 N.E. 209). In analyzing plaintiff's claim that he was injured, it is important to keep in mind that the falsity in fabricated quotation consists not necessarily in its contents, but in the assertion that such words were ever spoken at all. Thus, as noted by the Supreme Court, the danger in a fabricated quotation is not only that it might attribute an untrue factual assertion to the speaker, which itself may or may not be defamatory, but that "regardless of the truth or falsity of the factual matters asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold" (*Mason v. New York Magazine, Inc.,* 501 U.S. 496, 511, 111 S. Ct. 2419, 2430, 115 L.Ed.2d 447).

Here, the nexus of plaintiff's claim is that he never made the admission attributed to him and that he was defamed, not only by its substantive falsehood, but simply by the fact that people would believe he would say such a thing, i.e., that he was made to look ridiculous and dishonest not only by the very idea that he would be relieved not to win the election in which he was asking people to vote for him but by the additional assertion that he had freely admitted it, thereby making a mockery of permitting his name to remain on the ballot. Under these circumstances, we find that the attribution to plaintiff of these words is sufficiently capable of a defamatory construction to present a jury question as to whether this statement was such as to hold plaintiff up to public "contempt, ridicule or disesteem" (*Cyran v. Finlay Straus, Inc.,* 302 N.Y. 486, 489, 99 N.E.2d 298).

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Finally, defendants argue that plaintiff, concededly a public figure, has failed to make an adequate showing of malice, i.e., that defendants knew the statement was false or acted with reckless disregard as to its truth or falsity, as required by *New York Times Co. v. Sullivan*, 376 U.S. 251, 81 S. Ct. 710, 11 L.Ed.2d 686. Clearly, since the falsity that plaintiff points to is not only that of the admission itself, i.e., that he was relieved by the prospect of losing the election but in the fact that it was attributed to him, the relevant focus must be on whether the defendants knew, or had reason to know, that they were falsely ascribing the admission to plaintiff. In this type of defamation claim, where the defendants are aware of plaintiff's exact words and plaintiff is urging that they were falsely reported, the question of whether defendants knew their attribution was false necessarily revolves around how the defendants presented the matter to the reader. If the defendants informed the reader that they were actually quoting the plaintiff, a much stricter standard must apply than if the defendants only informed the reader that they were offering their own interpretation of the meaning of plaintiff's words.

Plaintiff argues that the defendants' knowledge should be analyzed according to the standard set forth in *Masson v. New Yorker Magazine*, 501 U.S. at 517, 111 S. Ct. at 2433, which holds that, in order to establish knowledge of falsity for purposes of *New York Times Co. v. Sullivan, supra*, at 279-280, 84 S. Ct. at 725-726, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S. Ct. 2997, 3008, 41 L.Ed.2d 789, a party alleging that he or she was falsely quoted must show that the alteration in his or her words "result[ed] in a material change in the meaning conveyed by the statement." Although the statement at issue here, unlike the ones dealt with in *Masson*, was not surrounded by quotation marks, this does not, as defendants argue, eliminate

the possibility that this standard should apply. In *Masson*, the Court referred to claims which are "analogous" to fabricated quotations (*Masson v. New Yorker Magazine, supra*, 501 U.S. at 518, 111 S. Ct. at 2433) and indicated that the real standard is not whether quotation marks are used, but whether a reasonable reader would understand that the author was making "nearly verbatim reports of statements made by the subject" (*supra*, at 513, 111 S. Ct. at 2431), rather than his or her "own interpretation of an ambitious source" (*supra*, at 519, 111 S. Ct. at 2434). The within statement, while not surrounded by quotation marks, used a similar device, i.e., use of the word "admits", which, like quotation marks, could convey to a reader that it was plaintiff's words, not the author's, which were being reported. Under these circumstances we find that the statement could reasonably be read not as the author's interpretation, but as a tacit quotation, relating the actual content of plaintiff's admission.

Once the court finds a reasonable basis from which a jury could find that words were defamatory, it is for the jury to evaluate how the words would be understood by the ordinary and average reader (*James v. Gannett Co.*, 40 N.Y.2d 415, 419, 386 N.Y.S.2d 871, 353 N.E.2d 831). Thus, in this case, we find that, in light of defendants' use of the word "admits", there is a reasonable basis from which the jury could find that the words were likely to be understood by the ordinary and average reader as a nearly verbatim report. If the jury were to make such a finding, review of the defendants' knowledge would be required under the *Masson* standard, and the jury would then be required to consider whether, by stating that plaintiff had "admit[ted]" he would be relieved to lose the election, defendants materially changed the meaning of his actual statements.[2]

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2. Plaintiff does not argue that the statement would be actionable if it were not the equivalent of a quotation, in which case the standard for judging

(Cont'd)

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We find that plaintiff has sufficiently shown by clear and convincing evidence that genuine issues of fact remain as to whether a reasonable reader would believe the statement was the equivalent of a quotation, and, if so, whether the deviation between the stated comments and the published alleged admission resulted in a material change in meaning.

Accordingly, since jury questions are presented as to whether the alleged admission was the equivalent of a quotation, and, if so, whether it constituted a material deviation from plaintiff's actual statements and, if so, whether its attribution to plaintiff was sufficient to hold him up to public contempt or ridicule, summary judgment dismissing the complaint was not warranted.

All concur except ROSENBERGER, J. who dissents in a memo as follows:

ROSENBERGER, Justice (dissenting).

I dissent and would affirm the grant of summary judgment to the defendants. In *Immuno Ag. v. Moor-Jankowski,* the Court of Appeals recognized:

> that matters of free expression in books, movies and the arts generally, are particularly suited to resolution as a matter of State common law and State constitutional law, the

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(Cont'd)

whether any errors in reporting plaintiff's remarks was done with "malice" would be whether the defendants' statement constituted a "rational interpretation" of plaintiff's actual words (*Time Inc. v. Pape,* 401 U.S. 279, 91 S. Ct. 633, 28 L.Ed.2d 45).

Supreme Court under the Federal Constitution fixing only the minimum standards applicable throughout, the Nation, and the State courts supplementing those standards to meet local needs and expectations (*see, e.g., People ex rel. Areara v. Cloud Books,* 68 N.Y.2d 553, 557-558 [510 N.Y.S.2d 844, 503 N.E.2d 492]). Indeed, striking an appropriate balance "between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech" (*Milkovich v. Lorain Journal Co.,* 497 U.S. [1,] at 14, 110 S. Ct., [2695,] at 2703, [111 L.Ed.2d 1 (1990)], *supra*), is consistent with the traditional role of State courts in applying privileges, including the opinion privilege, which have their roots in the common law (*see, Immuno AG. v. Moor-Jankowski,* 74 N.Y.2d [518], at 555 [519 N.Y.S.2d 938, 549 N.E.2d 129], *supra; Cole Fisher Rogow, Inc. v. Carl Ally, Inc.* 25 N.Y.2d 943 [305 N.Y.S.2d 154, 252 N.E.2d 633]; *Julian v. American Business Consultants,* 2 N.Y.2d 1 [155 N.Y.S.2d 1, 137 N.E.2d 1]; *Hoepner v. Dunkirk Printing Co.* 254 N.Y. 95, 99 [172 N.E. 139]).

This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas (*Matter of Beach v. Shanley,* 62 N.Y.2d 241, 255-256 [476 N.Y.S.2d 765, 465 N.E.2d 301] [Wachtler,

J., concurring]). That tradition is embodied in the free speech guarantee of the New York State Constitution, beginning with the ringing declaration that "every citizen may freely speak, write and publish * * * sentiments on all subject." (NY Const, art I, § 8.) Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms (*see*, Forkosch, *Freedom of the Press; Croswell's Case*, 33 Fordham L.Rev. 415 [1965]).

"The expansive language of our State constitutional guarantee (*compare*, NY Const, art 1, § 8, *with* US Const. 1st Amend), its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States * * * the recognition in very early New York history of a constitutionally guaranteed liberty of the press * * * and the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and discriminating news of public events' * * * all call for particular vigilance by the courts of this State in safe-guarding the free press against undue interference." (*O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 528-529 [528 N.Y.S.2d 1, 523 N.E.2d 277].)

(*Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 248-249, 566 N.Y.S.2d 906, 567 N.E.2d 1270, *cert. denied*, 500 U.S. 954, 111 S. Ct. 2261, 114 L.Ed.2d 713).

Thus, whether by the application of "interpretive" (*e.g.*, text, history) or "nonimterpretive" (*e.g.*, tradition, policy) (*see, People v. P.J. Video*, 68 N.Y.2d 296, 302-303, 508 N.Y.S.2d 907, 501 N.E.2d 556, *cert. denied*, 479 U.S. 1091, 107 S. Ct. 1301, 94 L.Ed.2d 156) factors, the "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by" the Federal Constitution (*O'Neil v. Oakgrove Constr.*, 71 N.Y.2d, at 529, n3, 528 N.Y.S.2d 1, 523 N.E.2d 277, *supra*). This case lends itself particularly to New York State law analysis. The words complained of "[plaintiff] admits he doesn't expect to win and is relieved by the prospect" appear not only on the editorial page of the defendants' newspaper, but within an editorial setting forth that paper's endorsements for a primary election which was to take place four days later. Here, we must determine whether the reasonable reader would believe that the statement was conveying a fact about the plaintiff. While it is true that false statements are actionable when a reasonable reader would perceive them to be factual, they "must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying *any* facts." (*Immuno AG. v. Moore-Jankowski, supra*, at 254, 566 N.Y.S.2d 906, 567 N.E.2d 1270 (emphasis in original)). That the statement appeared in an endorsement editorial is thus particularly significant.

This has been underscored by the Court of Appeals holding in *Brian v. Richardson*, 87 N.Y.2d 46, 637 N.Y.S.2d 347, 660 N.E.2d 1126, decided after the instant case was argued. The Court reiterated that the context in which a statement is published

is highly significant in determining issues such as this. It observed that Op Ed pages are for ideas on matters of public concern, will represent viewpoints of authors, and will contain considerable hyperbole, speculation and opinion. This context "provided some signals to the reader that its contents were expressions of opinion." A political endorsement editorial in a newspaper is even more plainly opinion than is an Op Ed article.

In *Chapandeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 311 N.E.2d 569, a case often cited and never disturbed, the Court of Appeals stated,

> where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

The defendants were not grossly irresponsible. The plaintiff admits that he did not expect to win the election. He does not deny that, when asked what he would do if he won, he responded that he had two children in college, and that it would be a tremendous financial sacrifice for him, given the low salary of an assemblyman. However, he denies that he used the word "relieved" in speaking of the prospect.

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> In analyzing the words in order to ascertain whether a question of fact exists for resolution upon trial, the court will not pick out and isolate particular phrases but will consider the publication as a whole, (citation omitted). The publication will be tested by its effect upon the average reader, (citations omitted). The language will be given a fair reading and the court will not strain to place a particular interpretation on the published words. (citations omitted). The statement complained of will be "read against the background of its issuance" with respect to "the circumstances of its publication". (citation omitted). "It is the duty of the court, in an action for libel to understand the publication in the same manner that others would naturally do. 'The construction which it behooves a court of justice to put on a publication which is alleged to be libellous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer' ". (citations omitted).

(*James v. Gannett Co.*, 40 N.Y.2d 415, 419-420, 386 N.Y.S.2d 871, 353 N.E.2d 834).

False statements of fact are only actionable where also proven to be defamatory. A defamatory statement is one which, as observed by the majority, "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society". (*Rinaldi v.*

Holt, Rinchart & Winston, 42 N.Y.2d 369, 379, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied*, 431 U.S. 969, 98 S. Ct. 514, 51 L.Ed.2d 45, *quoting, Sydney v. Macfadden Newspaper Pub. Corp.*, 242 N.Y. 208, 211-212, 151 N.E. 209). It is simply inconceivable that the substitution of the word "admits" for the word "seems" could produce such dire results.

There is a particular value to summary judgment, where appropriate, in libel cases, "libel, this is an additional ground for preferring the independent State law approach to one that might make summary disposition less likely . . . hyper-technical parsing of a possible 'fact' from its plain context of 'opinion' loses sight of the objective of the entire exercise, which is to assure that — with due regard for the protection of individual reputation — the cherished constitutional guarantee of free speech is preserved." (*Immuno AG. v. Moor-Jankowski, supra*, at 256, 566 N.Y.S.2d 906, 567 N.E.2d 1270).

Since the challenged statement is a simple recasting of the plaintiff's words, not altering their plain meaning to the reasonable reader; appeared within an editorial; concerned a concededly public figure; was not grossly irresponsible; and, finally, was not defamatory, the grant of summary judgment to defendants was entirely appropriate.

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED JUNE 21, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

Index No. 7846/92

ALBERT J. MILLUS,

Plaintiff,

- against -

NEWSDAY, INC., and WILLA APPEL,

Defendants.

DECISION AND ORDER

MARTIN SCHOENFELD, J.:

In this action plaintiff Albert J. Millus claims that he was libeled when an editorial written by defendant Willa Appel ("Appel") and published by defendant Newsday, Inc. in the newspaper "Newsday" stated that Millus, who was then running for elective office, "admits he doesn't expect to win and is relieved by the prospect." Defendants now move, pursuant to CPLR §§ 3211(a) (7) and 3212, to dismiss the complaint for failure to state a cause of action and/or for summary judgment. For the reasons set forth herein, defendants' request for summary judgment is granted.

Appendix C

Background

Plaintiff, a Harvard Law School graduate with a long, varied, and successful career as an attorney, has occasionally dabbled in electoral politics. In January of 1992 he was the Republican-Conservative candidate in a special election for New York State's 44th Assembly District seat. The district covers areas in central Brooklyn, and the special election was necessitated by the conviction — subsequently overturned — of Mel Miller, who had been the Speaker of the Assembly.

Appel interviewed plaintiff at Newsday's offices on January 22, 1992 in preparation for an editorial endorsement for the race. Appel's contemporaneous notes indicate that she and plaintiff discussed the fact that the district encompassed some 40,000 registered Democrats, 5,000 registered Republicans, 300-400 registered Conservatives, and 6,000 "independent" voters. Appel claims that plaintiff stated it would be a "miracle" if he won. Appel also claims that when asked if he *wanted* to win, plaintiff's response "was to note that he was paying college tuitions and that winning the election would pose a substantial hardship on him." Appel's notes include the following:

> ? Does he want to win ?
> successful lawyer — 2 kids in college
> winning would be a big $ loss
> pay is $57,000

Plaintiff describes the relevant part of his interview as follows:

> We clearly discussed my underdog status and the fact that I was an attorney with a fairly successful practice. However, under no

> circumstances did I ever express any desire not to be elected. Nor did I ever state that I would be relieved if I was defeated.

After the interview Appel prepared a draft of the editorial that included the following language:

> Albert Mi-llus [*sic*] . . . seems neither to want nor expects to win.

In her moving *affidavit* Appel says that when she showed her draft to an editor they "agreed that the phrase that Millus 'seems neither to want nor expect[s] to win' was awkward and that the word 'seems' was redundant because what I was writing was an editorial which, by definition, is a matter of opinion." At her deposition Appel stated that "the editor" changed "seems" to "admits," and that Appel consented to the change. The editor confirmed, at his deposition, that he made the change, and that Appel consented thereto.

The final editorial, printed on January 24th as part of what Appel refers to as Newsday's " 'Viewpoints' editorial page," includes the following language:

> Joni Yoswein (D-L) is running against Lawyer Albert Millus (R-C) who admits he doesn't expect to win and is relieved by the prospect. That's just as well, since Millus — unlike the experienced Yoswein — hasn't a clue about government: Albany's budget battle is beyond him. He seems more concerned about the moral standards of TV shows like "Dallas."

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Appel states that at all times she believed in the truth of the contents of the editorial, which simply contained her opinions.

Plaintiff claims that his campaign (modest though it may have been) contained the usual hoopla and paraphernalia (including a written endorsement by an aspiring New York City mayoral candidate named Rudolph Giuliani). He says that he ran "in an effort to win and certainly would not have permitted my name to remain on the ballot if I did not wish to follow through what I had started." The election was held on January 28, 1992, and plaintiff, who spent some $2,500 to his opponent's $46,500, lost by approximately a 3-1 margin.

Defendants argue that they are entitled to dismissal or summary judgment for four independent reasons: the statement at issue was an opinion and thus absolutely privileged; the statement was true; the statement was not defamatory; and plaintiff cannot show that the statement was made with actual malice.

Discussion

Opinion versus Statement of Fact

> It is a settled rule that expressions of opinion, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions.

Steinhilber v Alphonse, 68 NY2d 283, (1986). Furthermore, the determination of what constitutes "opinion" "begins by looking at the content of the whole communication, its tone and purpose." *Immuno AG v Moore-Jankowski,* 77 NY2d 235, 254, *cert den* 500 US 954, 111 S Ct 2261 (1991).

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On the other hand, in *Milkovich v Lorain Journal Co.*, 497 US 1, 10 (1990), the Supreme Court stated that there is no "wholesale defamation exception for anything that might be labeled an 'opinion' " since "expressions of 'opinion' may often imply an assertion of objective fact." Nor does a statement's appearance in the context of an editorial provide an absolute shield from liability. *Guccione v Flynt,* 618 F Supp 164 (SDNY 1985) (Sweet, J.). Moreover, in the leading case of *Masson v New York Magazine,* 501 US 496, 111 S Ct 2419, 2433 (1991), the Supreme Court noted that the general test — whether the defendant had made a "rational interpretation" of the plaintiff's words — would not apply where the defendant "fabricated" a quotation or had done something "analogous."

This Court finds that defendants' statement that plaintiff "admits he doesn't expect to win and is relieved by the prospect" was a statement of their opinion, and that making this statement was not "analogous" to having "fabricated a quotation." It is uncontroverted that plaintiff expressed both his recognition of his district's 8-1 Democratic enrollment majority and the income reduction that winning would entail. Reading an "editorial" on a "viewpoints" page — especially one containing a statement as subjective as that plaintiff "hasn't a clue about government" — a reasonable reader could only conclude that defendants were expressing an opinion about plaintiff. Indeed, plaintiff could hardly argue that defendants' statement that plaintiff "hasn't a clue about government" was anything more or less than their opinion. While the statement *at issue* may be closer to the *middle* of the opinion-fact continuum, what plaintiff *did* say could have engendered an opinion that plaintiff *was* admitting that he neither expected nor wanted to win. It is also noteworthy that defendants merely said that plaintiff was *relieved by the prospect* of not winning, which is quite different from saying that he did not *want* to win.

Appendix C

In the final analysis, free speech in a democratic society requires the leeway to form and publish opinions about a candidate's state of mind. It is one thing for a journalist to "put words in one's mouth," and quite another to "read between the lines." Failure to undertake the latter would amount to an abject abdication of responsibility by the "eyes and ears of the public."

Actual malice

Even assuming, *arguendo,* that the statement at issue was a statement of fact, plaintiff would have to demonstrate, by clear and convincing evidence, that defendants published the statement at issue "with actual knowledge that the statement was false" or while "in fact entertain[ing] serious doubt as to the truth of [the statement] — a culpable state of mind." *See, generally, New York Times Co. v Sullivan,* 376 US 254, 280 (1964) (Brennan, J.). Furthermore, a news reporter "can even draw the wrong conclusion . . . and not be grossly irresponsible if [his or her] conclusion was not unwarranted." *Hairston v Bancorp, Inc.,* 20 Med L. Rep. 1600, 1603, 1992 WL 368789 (Sup Ct, NY Co 1992).

In this case it appears that defendants' "conclusions" were "not unwarranted" in light of the reservations expressed by plaintiff about his chances of winning and the prospects he faced if he were to win.

This is not to put the Court's imprimatur on an editorial process by which a *question* about plaintiff's state of mind first evolved into the statement that he *"seems* neither to want nor expects to win", and then evolved into the statement that plaintiff "*admits* he doesn't expect to win and is relieved by the prospect." However, it is not a Court's job to "second guess" legitimate, or

even arguable, editorial decisions. Rather, it is a Court's job, on a post-disclosure motion for summary judgment such as this, to determine whether plaintiff has "produce[d] evidentiary proof in admissible form sufficient to require a trial of" the question of actual malice. See *Gilbert Frank Corp v. Federal Insurance Co.*, 70 NY2d 966, 967 (1988) (summary judgment standard). On the record before us, we fail to see evidence that defendants harbored animosity towards plaintiff, or that they acted with utter indifference towards the truth of the statement at issue.

Conclusion

As a matter of law, the statement at issue was a statement of opinion rather then a statement of fact. Furthermore, plaintiff has failed to raise a material issue of fact as to defendants' alleged "malice."

Thus defendants must be and are granted summary judgment dismissing plaintiff's complaint (and the Court need not and does not reach the other issues raised by defendants).

This opinion constitutes the decision and order of the Court.

Dated: June 21, 1994

s/ Martin Schoenfeld
J.S.C.

APPENDIX D — ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED MAY 14, 1996

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 14, 1996

Present - Hon. Ernst H. Rosenberger, Justice Presiding
Betty Weinberg Ellerin
Richard W. Wallach
Theodore R. Kupferman
Angela M. Mazzarelli, Justices

M-1782
M-1788
Index No. 7846/92

Albert J. Millus,

Plaintiff-Appellant,

- against -

Newsday, Inc. and Willa Appel,

Defendants-Respondents.

A decision and order of this Court having been made and entered on February 15, 1996 [Appeal No. 54416], reversing on the law an order of the Supreme Court, New York County, entered on June 24, 1994,

And defendants-respondents, having moved for leave to appeal to the Court of Appeals from the aforesaid order of this Court,

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And The New York Times Company, Daily News, L.P., and Dow Jones & Company, Inc., having jointly moved for leave to file a brief amici curiae in connection with the aforesaid motion for leave to appeal to the Court of Appeals,

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon,

It is ordered that defendants-respondents' motion be and the same hereby is granted insofar as to grant leave to appeal to the Court of Appeals, and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

> "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

The motion for leave to appear as amici curiae is denied.

ENTER:

s/ Catherine O'Hagan Wolfe
Clerk.

APPENDIX E — ORDER OF THE COURT OF APPEALS OF NEW YORK STATE DATED SEPTEMBER 12, 1996

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of September 1996

PRESENT, HON JUDITH S. KAYE, *Chief Judge, presiding*

Mo. No. 1129

Albert J. Millus,

Respondent,

v.

Newsday, Inc. et al.,

Appellants.

A motion having heretofore been made herein upon the part of The New York Times Company, et al. for leave to file a brief *amici curiae* on the appeal herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the proposed brief is accepted as filed.

s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

APPENDIX F — THE WALL STREET JOURNAL ARTICLE DATED DECEMBER 12, 1991 ENTITLED THE JOY OF WHAT?

REVIEW & OUTLOOK

The Joy of What?

If we have just lived through 25 years of the Sexual Revolution, it looks as if a lot of people might be ready for the Counter-Revolution.

In the last half of 1991, the American people watched a Senate committee discuss Long Dong Silver with a nominee for the Supreme Court of the United States, learned that Magic Johnson had contracted the AIDS virus, watched the New York City Board of Education hand out condoms to adolescents and, as the Christmas season began, listened to a nephew of president John F. Kennedy describe on the evening news how a woman he had picked up in a Palm Beach bar "massaged" him until, as was noted on the front page of Newsday yesterday, "I ejaculated."

Does anyone want to step forward and claim responsibility for all this? This is the joy of what?

The following story sounds like a stand-up comic's joke, but it is true: A father was sitting in his dining room about 7:00 Monday evening, reading the paper and hearing the worst sort of prime-time-access drivel pouring out of the TV in a nearby room. He shouts: "Can't you kids find something better to watch than that junk?" Click, click and on comes the evening's news: ". . . raised the question today of whether William Kennedy Smith had in fact been able to sustain a (you know what) during his encounter with the alleged victim." Dad: "I see here where 'The Addams Family' is on now." Click.

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Here's another true story, but it doesn't sound like a joke: Last Tuesday the Census Bureau reported that one in four women who gave birth to a child in the previous year wasn't married. Since the mid-1970s, the rate among white women (actually, a lot of them are girls) had doubled and now stands at 17%. As a footnote, the report notes that a lot of the children were born into "two-parent families" — except that the two people weren't married.

At least their commitment to each other was somewhat stronger, apparently, than that between William Kennedy Smith and the woman who testified on TV with the blue cloud in front her face. It is intriguing to wonder how the country could have become so transfixed by what, at bottom, was the story of two barfiles.

The Kennedy name accounts for much of it, but not all. The media have served as the revolution's tuning fork, pitching at us every conceivable modulation of these more open "relationships." It seemed uncertain, through, whether the Palm Beach rape trial was another turn in the recent politics of sexual victimization or just another turn through checkout-counter journalism. Maybe at the end of the day, this affair was about something altogether alien to contemporary culture, namely sin.

Sin isn't something that many people, including most churches, have spent much time talking about or worrying about through the years of the revolution. But we will say this for sin; it at least offered a frame of reference for personal behavior. When the frame was dismantled, guilt wasn't the only thing that fell away; we also lost the guidewire of personal responsibility.

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The revolution devalued personal responsibility because that implied unacceptable moral coercion, but it never quite produced its *magnun opus* on the proper conduct of sexual relations. Everyone was left on his or her own. It now appears that many wrecked people could have used a road map.

Like Magic Johnson. With a few dissenting exceptions, 96 hours and 96 zillion column inches of sentiment washed over the falls about how all this proved the need for "safe sex" before someone finally said that Magic Johnson's sex life was, simply, wrong. The view of the "hero," Magic Johnson, was, "All I had to do was wear condoms." Then Martina Navratilova blew the whistle, saying that if a woman had admitted to having hundreds of partners, they'd call her a "slut."

Slut is an old-fashioned word. It carries a degree of moral judgment, and that's not done much anymore, at least not in print or on TV. Among intellectuals and commentators, judgment was long ago replaced by therapy. Ministers and priests gave way (voluntarily) to clinics and counselors. Instead of giving your kid a dressing-down, you now give (him or her) a condom. The ministers of the therapeutic say the dressing-down is useless because the kids don't know what you're talking about anyway. By now, that may be right.

This is not an appeal for prudery; it is an appeal for prudence. Prudence implies some skill, which can be taught, at exercising judgment, at making distinctions. The United States has a drug problem and a high school sex problem and a welfare problem and an AIDS problem and a rape problem. None of this will go away until more people in positions of responsibility are willing to come forward and explain, in frankly moral terms, that some of the things that people do nowadays are wrong.

APPENDIX G — RETRACTION DEMAND HAND-DELIVERED TO RESPONDENT NEWSDAY, INC. DATED JANUARY 25, 1992

January 25, 1992

Editor
Newsday
Two Park Avenue
New York, New York

Dear Sir:

I am the Republican-Conservative candidate for the Assembly seat vacated by Mel Miller in the 44th A.D., Brooklyn, N.Y.

On Wednesday, January 22, 1992, I was interviewed by Willa Appel and Mickey Carroll, two reporters of your newspaper. An article without a by-line appeared in your paper of January 24, 1992 entitled "Easy Choices." (page 54). It contained two totally false claims of an admission by me. It alleged that I *admitted* (emphasis added) that I did not expect to win and was relieved by the prospect.

I called Willa Appel the same day and she later returned my call. She admitted to me over the phone that I never made the admissions she attributed to me but justified her article by telling me that such statements were implied from our conversation. Please retract the claims of an "admission" by me. This must be done in you January 27, 1992 edition in view of the fact that the Special Election will be held on January 28th and many people will have voted prior to reading your paper on January 28, 1992.

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Please have your attorneys contact me for any further information regarding this matter.

Kindly fax me a confirmation on receipt of this letter. You may telephone me at home by calling 718-282-3055.

Sincerely yours,

s/ Albert J. Millus
ALBERT J. MILLUS

AJM/rr

APPENDIX H — ORIGINAL DRAFT OF AN EDITORIAL ENDORSEMENT FOR PUBLICATION

EASY CHOICES

New York Newsday, Jan. 24, 1992

There's little suspense about the outcomes of next Tuesday's two special elections for state Assembly. Both the 44th Assembly District in Brooklyn and the 35th AD in Queens are heavily Democratic and the Republicans have put up only token candidates. Barring the unforeseen, Tuesday's vote will merely anoint the Democrats' choices.

The race in the 44th AD (Flatbush, Midwood, Windsor Terrace and Park Slope) is for the seat Mel Miller — recently convicted of conspiracy and mail fraud — held 21 years. His longtime legislative aide, Joni Yoswein (D-L) is running here against lawyer Albert Millus (R-C), who admits he doesn't expect to win and is relieved by the prospect. That's just as well since Millus — unlike the experienced Yoswein — hasn't a clue about government: Albany's budget battle is beyond him. He seems more concerned about the moral standards of TV shows like "Dallas."

APPENDIX I — ORIGINAL DRAFT OF EDITORIAL OF NEW YORK NEWSDAY DATED JANUARY 24, 1992

,VB. 15¢ There's little suspense about the outcomes of two special elections for state Assembly that will be held next Tuesday. Both the 44th Assembly District in Brooklyn and the 35th AD in Queens are heavily democratic and the Republicans have put up only token candidates. Barring something freakish, Tuesday's vote should be a confirmation of the obvious.

,VB. 15¢. The race in the 44th AD — Flatbush, Midwood, Windsor Terrace and Park Slope — is more interesting because it's for the seat Mel Miller — recently convicted of conspiracy and mail fraud — held for 21 years. His longtime legislative aide, Joni Yoswein, Democratic-Liberal, is running here against lawyer Albert Millus, Republican-Conservative, a candidate who seems neither to want nor expects to win. That's just as well since Millus — unlike the experienced Yoswein — hasn't a clue about what government is all about.

,VB. 15¢. In the 35th AD — East Elmhurst, Corona, parts of Jackson Heights and Elmhurst — Jeffrion Aubry, Democrat-Liberal, similarly out classes his Republican-Conservative opponent, civic activist Fay Burwell. Aubry, Borough President Claire Shulman's economic development director has helped make Jamaica's Farmers Market and Hollis' retail center happen. His experience should serve Queens constituents well in Albany.